IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 05-00338 (ESH)
	)	
ANTHONY A. WILLIAMS and DISTRICT OF COLUMBIA	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION AND SUMMARY OF ARGUMENT

The unconstitutional, preempted and ill-considered action by the Council of the District of Columbia ("D.C. Council") to ban all interstate shipments of certain hazardous materials through the District of Columbia should be immediately enjoined (1) to prevent irreparable injury to shippers, purchasers and the common carrier, CSX Transportation, Inc. ("CSXT"); (2) to insure that these vital products reach their destinations in the shortest time over the safest route with the least handling; (3) and to discourage other local communities from enacting similar protectionist legislation that could bring our national system for the transportation of these essential materials to a standstill.

On February 1, 2005, the D.C. Council, apparently dissatisfied with the actions and decisions of the U.S. Congress, the U.S. Department of Transportation ("DOT") and the U.S. Department of Homeland Security ("DHS"), decided to take matters into its own hands and passed a local ordinance banning, on an emergency basis for 90 days, all interstate shipments by rail or truck of four categories of hazardous materials (the "Banned Materials") through the so-called "Capitol Exclusion Zone" within the District of Columbia. *See* "Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005," D.C. Bill 16-77 (the "District Act" or the "Act") (Exhibit 3 hereto).[1] Mayor Anthony A. Williams signed this legislation into law on February 15, 2005. In taking this action, the District of Columbia has usurped the role of Congress and the federal agencies charged with responsibility for a safe, secure and efficient rail

[1] A set of exhibits to the Memorandum is filed herewith. The last exhibit, Exhibit 20, is a glossary of acronyms and key terms used in the challenged legislation and in this Memorandum.

transportation system in the United States to support national commerce. Unless the implementation and enforcement of the Act is enjoined, pending the Court's consideration of its legality, thousands of rail cars will have to be rerouted hundreds of thousands of rail miles through Maryland, New Jersey, New York, Ohio, Pennsylvania, Virginia, West Virginia and other states, thereby disrupting CSXT's rail operations and shifting the risk inherent in this traffic to many other jurisdictions, including many urban areas, with no consideration given to the interests of those other jurisdictions.

CSXT appreciates that there are many public policy issues involving the production, use and transport of the commodities covered by the District Act. In this action, CSXT takes no position with respect to those issues. Rather, in this action CSXT seeks judicial authorization to comply with its federal common carrier obligation (*see* 49 U.S.C. § 11101) to transport goods and materials tendered to it in a safe and efficient manner over its long-established routes.

This case does not require the Court to assess the facts relevant to determining the safest and most secure way to transport hazardous materials by rail in interstate commerce. Instead, this case presents the purely legal question of *who* gets to make that determination. Law and logic dictate that the Federal Government must make that determination, which affects the entire national rail network. A preliminary injunction will simply preserve the Federal Government's longstanding role as preeminent regulator of the national rail network pending this Court's determination of the merits.

The regulation of interstate rail shipments of hazardous materials is quintessentially a matter for the Federal Government. The U.S. Constitution commits to Congress the power to regulate interstate commerce, precisely to permit the free flow of

goods and to prevent any state or local jurisdiction from creating obstructionist roadblocks. Tacitly recognizing that protection of the United States Capitol is a federal matter, the D.C. Council found (erroneously) that "[t]he federal government has not acted to prevent the terrorist threat resulting from the transportation of dangerous quantities of ultra-hazardous materials near the Capitol." District Act § 2(3). In fact, as explained herein, the Federal Government has been diligent in acting to minimize the inherent risks of transporting hazardous materials by rail, both nationwide and in the District specifically. CSXT has taken all of the steps requested and required by the Federal Government and has undertaken its own voluntary measures to minimize the risks posed.

Total rerouting in perpetuity of these hazardous materials will impose serious operational burdens on CSXT and will almost certainly be counter-productive. Rerouting results in longer distances and transit times, increased car handlings (coupling and uncoupling of the cars), and more yard "dwell" time, each of which tends to *increase* the inherent risk in transporting hazardous materials. The Federal Government, while necessarily sensitive to the needs of the nation's capital, must balance the interest of a local jurisdiction with the interests of the nation as a whole.

The councilmembers who voted in favor of the bill focused entirely on the interests of their constituents. No attention was paid to residents of the jurisdictions lying on the potential alternative routes. At the same time, the principal sponsor, Councilmember Kathy Patterson, has urged other jurisdictions all over the country to pass similar legislation: "I am urging my colleagues to move ahead with our legislative remedy, and urge other communities to follow suit." John Gallagher, *Rail's Pandora's Box*, Traffic World, Nov. 1, 2004, at 11. If other cities or local governments pass similar

laws, rail traffic in these essential commodities will grind to a halt.[2] Should this happen, chlorine would not reach the water treatment facilities in major metropolitan areas, threatening the drinking water; propane that is used to heat homes would not reach its destinations; and other materials needed for critical agricultural and industrial processes would be stranded, threatening the nation's health, economy and security. Even without such copycat legislation, the District Act alone will impede the delivery of these products, delaying and increasing the costs and dangers of their transportation.

For these reasons, the U.S. DOT recently advised the independent federal body, the Surface Transportation Board (the "Board" or "STB"), that the District Act is preempted by federal railroad legislation. *See* Comments of United States Department of Transportation, Finance Docket No. 34662 (STB) (Feb. 16, 2005) ("DOT Comments") (Exhibit 2 hereto). Representatives of CSXT and the DOT had previously advised the D.C. Council of their legal analysis prior to the passage of the Act. Indeed, the District's own Director of Transportation testified to the D.C. Council that its contemplated legislation was preempted by federal law. *See* Written Testimony of Dan Tangherlini before the D.C. Council Committee on Public Works and the Environment, Public Hearing (Jan. 23, 2004) ("Tangherlini Testimony") (Exhibit 7 hereto). The D.C. Council simply ignored all this weighty legal analysis and deliberately provoked this litigation.

CSXT meets all of the criteria for obtaining a preliminary injunction:

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[2] To take but one example, Pittsburgh local news reported February 1, 2005 that city councilmember Jim Motznik was advocating rerouting there: "We'll just simply have to have the railroads detour . . . ." *Councilman Wants Stricter Rules for Railroads*, KDKA2 News, *available at* http://kdka.com/local/local_story_032112328.html (Feb. 1, 2005).

Likelihood of success on the merits. There is an overwhelming likelihood that CSXT will prevail on the merits. The District Act is invalid for five separate reasons:

- The District Act on its face is protectionist legislation that unreasonably burdens interstate commerce in violation of the U.S. Constitution. "[A] law that overtly blocks the flow of interstate commerce at a State's borders" is the "clearest example" of a law that is *per se* invalid under the Commerce Clause. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). One state "may not . . . increase[] hazards on the highways of neighboring States in order to decrease the hazards on [its own highways]." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 686 (1981). This is precisely what the District of Columbia has done in this case with respect to rail lines.

- The District Act is expressly preempted by Section 20106 of the Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20153 ("FRSA"), which flatly prohibits all regulation by municipal corporations, like the District, of rail safety and security, and prohibits regulations like the District Act even by states when, as here, DOT and/or DHS have covered the subject matter.

- The District Act is expressly preempted by Sections 5125(a) and (b) of the federal Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101-5127 ("HMTA"), which prohibits unilateral bans on hazardous materials transportation by state or local jurisdictions like the District Act.

- The District Act is expressly preempted by Section 10501(b) of the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§ 10101-11908 ("ICCTA"), which gives exclusive jurisdiction to the Surface Transportation Board over transportation by rail carriers, including routes.

- The District Act is also invalid because it is not an authorized exercise of legislative power under the Home Rule Act, which precludes the District from enacting legislation that usurps or interferes with federal authority or reaches beyond the District's borders, as this prohibition on interstate commerce does. *See* Home Rule Act § 602(a)(3) (D.C. Code § 1-206.02).

Irreparable Injury to CSXT. CSXT, its shippers and their customers, will be irreparably injured if the District Act is not enjoined. CSXT would be required to reroute thousands of rail cars carrying the Banned Materials (or cars unloaded of such materials) over substantially longer routes with significantly more handlings, exacerbating the risks already imposed upon CSXT which, as a common carrier, is required under current law

to transport the materials. This rerouting would impose substantial operational burden, expense and risk on CSXT for the duration of the District ban. Shippers and users of the Banned Materials are threatened with irreparable injury by increased delay and uncertainty in their supply chain; an injunction will allow them to continue their trade in these essential materials in an efficient, economical, safe and timely manner.

No Harm to the District. Conversely, the District of Columbia will not suffer any irreparable injury if the District Act is enjoined pending the Court's review. Because of comprehensive federal regulations, hazardous materials have been transported by rail through the District for decades without major incident. Despite the D.C. Council's declaration of an "emergency," the Act's enactment comes more than three years after the attacks of September 11, 2001, and more than a year after legislation was first introduced. Since September 2001, federal agencies with responsibility for the safety and security of our national rail network have diligently evaluated the situation and taken precautionary action. Many new security measures have been implemented, and these agencies continue to assess the need for further security enhancements. CSXT, in consultation with federal agencies, is at present voluntarily rerouting loaded cars of the Banned Materials from the north-south line ("I-95 Line") that runs south of the Capitol, and continues to confer with DHS and other federal agencies concerning the routing of these

cars and other security matters.[3] There is every reason to believe that the federal agencies will continue to be vigilant. An injunction would simply preserve this status quo.

The Public Interest. The public interest will be served by enjoining this legislation. Rerouting would increase the inherent risks associated with the transportation of these materials in many other jurisdictions, including other densely populated areas, through which alternative routes pass. An injunction would prevent this shift of burdens pending this Court's consideration of the legal interests in this case. Further, other jurisdictions will be cautioned against passing copycat legislation that could prove disastrous to our national transportation system. Finally, during this period of judicial review, Congress and the federal agencies will have ample time to respond to the dangers posed by the District Act and similar legislation and to make their positions clear to the courts, other federal agencies and local legislatures.

For all of these reasons, we respectfully urge the Court to grant a preliminary injunction pending the resolution of this matter on the merits.[4]

[3] The immediate adverse impact of the District Act on CSXT is due to the fact that the Act's prohibition is much broader than the voluntary reroute: it extends to CSXT's second line in the District, the east-west line ("B&O Line") in the northern portion of the District, and to the transport of unloaded cars containing only residues of hazardous materials on both lines.

[4] Following the resolution of this Motion for Preliminary Injunction, Plaintiff intends to file a Motion for Summary Judgment, as there are no genuinely contested issues of fact and this litigation simply poses dispositive issues of law. Federal Rule of Civil Procedure 56 precludes the filing of such a motion until 20 days after service of the Complaint, which was filed and served only six days ago, on February 16, 2005. We expect to file that motion within two weeks of the Court's ruling, taking into account the Court's analysis and any other legal developments that have occurred by that time.

STATEMENT OF FACTS

I. THE DISTRICT ACT

The D.C. Council passed D.C. Bill 16-77 as emergency legislation on February 1, 2005. Under District of Columbia law, "emergency" acts are passed on one reading, are not reviewed by Congress, and are effective for 90 days; permanent legislation, in contrast, requires two readings and a 30-day congressional review period. Home Rule Act § 412 (D.C. Code § 1-204.12), § 602(c) (D.C. Code § 1-233).[5] Mayor Anthony A. Williams signed the emergency bill into law on February 15, 2005. Although the Act states that it takes effect upon approval by the Mayor (District Act § 9), the District Department of Transportation ("DCDOT") has not yet issued implementing regulations, and the District has represented that it will not enforce the Act until March 19.

The District Act provides that it shall be illegal to transport the Banned Materials in or through the so-called "Capitol Exclusion Zone" without obtaining a permit from DCDOT, except when DCDOT suspends the permit requirement due to temporary "emergency" situations outside the District. District Act §§ 3(1), 4(a). The "Capitol Exclusion Zone" is defined as the area "within 2.2 miles of the U.S. Capitol Building." District Act § 3(2). The ban extends to "a vehicle or rail car which is capable of containing" a Banned Material and "has exterior placarding or other markings indicating that it contains such materials." District Act § 4(2). DCDOT is authorized to issue a

[5] The D.C. Council also approved on February 1 a companion bill in "temporary" form (D.C. Bill 16-78), which provides for a 225-day extension of the emergency act if approved at a second reading (scheduled for March 1), subject to Congressional review. *See* Rules for the Council of the District of Columbia, Council Period 16 Resolution of 2005, Rule 413. Our proposed preliminary injunction Order would extend to this legislation if it is passed by the D.C. Council and signed by the Mayor.

permit only if a carrier can demonstrate "that there is no practical alternative route" for the subject traffic. District Act § 5(a). The Council directed the Mayor to "issue rules to implement the provisions of this act." District Act § 7.

A predecessor bill, introduced on October 21, 2003, was the subject of a public hearing before the Committee on Public Works and the Environment on January 23, 2004. At that hearing, the Honorable George Gavalla, Associate Administrator for Safety, Federal Railroad Administration ("FRA"), described the federal approach to rail safety and security and explained that state and local laws related to rail safety and security are generally preempted because "Federal law recognizes the importance of a uniform system of railroad safety and security regulation." Written Testimony of George Gavalla before the D.C. Council Committee on Public Works and the Environment, Public Hearing (Jan. 23, 2004) (Exhibit 4 hereto) at 5. With respect to the proposed detour around Washington, D.C., Mr. Gavalla stated:

> The question is, is if you suspend shipments here all the time, the shipments are going to have to go through someone else's backyard. They're going to have to go through other major metropolitan areas, and our charge is to work with all the communities, all across the country, and to mitigate the risks all across the board. So it's a matter of making sure. We think the emphasis should be placed on preventing the incidents, detecting the incidents, constant vigilance, survivability, and emergency response. We need to look at everyone. We need to protect all communities across the country, because they're all important.

Oral Testimony of George Gavalla, Excerpt from the D.C. Council Committee on Public Works and the Environment, Public Hearing (Jan. 23, 2004) (Exhibit 5 hereto) at 14:1-14:10. Edward Bonekemper, a former Assistant Chief Counsel of DOT's Research and Special Programs Administration ("RSPA"), similarly testified that a unilateral effort by

a state or local jurisdiction to prohibit local rail transportation of hazardous materials would be preempted by federal law. *See* Written Testimony of Edward H. Bonekemper, III, before the D.C. Council Committee on Public Works and the Environment, Public Hearing (Jan. 23, 2004) (Exhibit 6 hereto).[6] Dan Tangherlini, Director of the D.C. Department of Transportation, also testified that the District should work with federal agencies because the federal "Hazardous Materials Transportation Act clearly specifies that state restrictions on HAZMAT transportation imposed without following federal procedures and standards will be invalidated by federal preemption." Tangherlini Testimony (Ex. 7) at 6.

At a "Public Roundtable" on November 22, 2004, Thomas J. Lockwood, Director of DHS's Office of National Capital Region Coordination, and Mr. H.R. "Skip" Elliott, CSXT's Vice President – Public Safety, explained to members of the D.C. Council the extensive measures they had taken, and were continuing to take, to address rail security in the District of Columbia. *See* Written Testimony of Thomas J. Lockwood before D.C. Council Committee on Public Works and the Environment, Public Roundtable (Nov. 22, 2004) ("Lockwood Testimony") (Exhibit 8 hereto); Written Testimony of H. R. "Skip" Elliott before D.C. Council Committee on Public Works and the Environment, Public Roundtable (Nov. 22, 2004) ("Elliott Testimony") (Exhibit 9 hereto). In response to questions about rerouting, Mr. Lockwood explained that DHS has authority to order

[6] RSPA is authorized to issue administrative determinations on whether state/local laws are preempted by HMTA's express preemption provision. 49 C.F.R. §§ 107.201-107.213. Mr. Bonekemper attached to his statement an index of RSPA preemption decisions and relevant judicial decisions (which the District provided to the Court on February 17, 2005 as part of the Act's legislative history).

rerouting, but that it has decided to address security in the D.C. area through the D.C. Rail Corridor Security Initiative project, not by ordering rerouting.

Councilmembers Kathy Patterson and Phil Mendelson publicly announced on January 28, 2005 that they were introducing an emergency bill (D.C. Bill 16-77) to ban transportation of certain hazardous materials: "The legislation will effectively prevent the through-shipment of [these hazardous materials] by rail or truck, thereby removing the risk and the threat to our residents." *See* Memorandum to Councilmembers (Jan. 26, 2005) (Exhibit 10 hereto) at 1. Ms. Patterson provided the rationale for the bill in her Statement on Introduction (Exhibit 11 hereto). The bill passed on February 1, 2005 after brief discussion. *See* Excerpt from the Second Legislative Meeting of the Council of the District of Columbia (Feb. 1, 2005) (Exhibit 12 hereto).

The District Act provides for a permit system, but the D.C. Council expressed its view that DCDOT should rarely issue permits. The Act's stated purpose is to "prohibit" shipment of the Banned Materials through the District and to allow for the issuance of permits only in "special" cases, and the D.C. Council expressly found that "[s]hippers of ultra-hazardous materials do not need to route large quantities of ultra-hazardous chemicals near the Capitol." District Act § 2(4). In assessing whether there is no "practical alternative route," thereby justifying a permit, the District Act directs DCDOT to consider only whether using an alternative route would be "cost-prohibitive," and not the extent to which rerouting would shift the inherent risk in transporting this traffic to other jurisdictions. District Act § 3(4).

II. CSXT RAIL OPERATIONS

CSXT rail operations are described in the Affidavit of John M. Gibson, Jr. ("Gibson Aff.") (Exhibit 1 hereto). CSXT is a Class I freight railroad that operates a rail network consisting of more than 21,000 route miles in 23 states, the District of Columbia and two Canadian provinces. Gibson Aff. (Ex. 1) ¶ 13; *see* Gibson Exhibit A. CSXT's north-south main line ("I-95 Line") runs along the eastern seaboard from Florida via Atlanta to Baltimore, Philadelphia, New York and Boston. CSXT also operates an east-west main line ("B&O Line") from Washington, D.C. via Maryland and West Virginia to Chicago and St. Louis. Both the I-95 Line and the B&O Line pass through the Capitol Exclusion Zone. Gibson Aff. (Ex. 1) ¶¶ 6, 15; *see* Gibson Exhibits B and C.

CSXT transported over 7,000,000 carloads of freight in 2003. About 500,000 of these carloads were classified as hazardous materials, including about 69,000 carloads within the classes prohibited by the District Act. Rail cars containing hazardous materials are transported in trains that also include cars containing non-hazardous materials. Indeed, forty to fifty percent of all CSXT trains include some cars carrying hazardous materials. CSXT has for decades transported hazardous materials, including the Banned Materials, via its I-95 Line and B&O Line through the District of Columbia. Gibson Aff. ¶¶ 18-20. CSXT does not originate or terminate any shipments of the Banned Materials at points within the District of Columbia. Rather, all such cars are interstate shipments passing through the District of Columbia. Gibson Aff. ¶ 7.

The DOT and the Transportation Security Administration ("TSA") acknowledge the critical import of hazardous materials to the national economy:

> Hazardous materials are essential to the economy of the United States and the well being of its people. Hazardous materials fuel

> cars and trucks, and heat and cool homes and offices. Hazardous materials are used for farming and medical applications and in manufacturing, mining, and other industrial processes.

Notice, Hazardous Materials: Transportation of Explosives by Rail, 68 Fed. Reg. 34,470, 34,472 (June 9, 2003). This includes classes of hazardous materials covered by the District Act:

> [Toxic Inhalation Hazard] materials play a vital role in our society, including purifying water supplies, fertilizing crops, providing fundamental components in manufacturing, and fueling the space shuttle.

Notice, Hazardous Materials: Enhancing Rail Transportation Security for Toxic Inhalation Hazard Materials, 69 Fed. Reg. 50,988, 50,988 (Aug. 16, 2004).

Hazardous materials are transported in cars specially designed and constructed to meet DOT and industry standards. Pursuant to federal regulations, the cars are placarded to indicate that they contain a hazardous material. These rail cars are typically owned or leased by the shipper or receiver, not by the railroad. After such a car is unloaded at destination, the car is usually returned to the point of origin via the most direct route for reloading by the shipper. Gibson Aff. ¶ 29. Federal law requires that unloaded cars continue to be placarded, unless they are cleaned of residue and purged of vapors (which is ordinarily not done by the receiver upon unloading). *See* 49 C.F.R. § 172.514(b).[7] This regulation thus requires placarding of virtually all of the unloaded cars transported by CSXT.

[7] Councilmember Patterson appears to have misunderstood this federal regulation. *See* Statement on Introduction (Ex. 11) at 8. The display of a placard does not mean that the car is loaded.

CSXT's handling of hazardous commodities is subject to a comprehensive scheme of federal regulation under the auspices of DOT (as to both rail safety and security) and DHS (as to rail security). Following the September 11, 2001 attacks, DOT actively exercised its regulatory authority by issuing regulations on the security of hazardous materials rail transportation. TSA, with the full cooperation of CSXT, also undertook in 2004 the D.C. Rail Corridor Project, a comprehensive vulnerability assessment of CSXT's I-95 Line through the District. This assessment was conducted by security experts over several months, using state-of-the-art techniques and standards. Representatives of the FRA and DHS also participated in this effort. TSA and CSXT are in the process of implementing the enhanced security measures recommended by TSA. *See* Lockwood Testimony (Ex. 8) and Elliott Testimony (Ex. 9).

In short, after lengthy and diligent investigation and analysis, the Federal Government has determined that hazardous materials, including the Banned Materials, may be transported by rail in interstate commerce (including through the District) so long as they are handled in accordance with federal safety and security requirements.

III. THE SURFACE TRANSPORTATION BOARD PROCEEDING

CSXT filed a Petition for Declaratory Order with the STB on February 7, 2005, asking the Board to declare that the District Act "is preempted by Section 10501 of the ICC Termination Act of 1995 ("ICCTA") and that, subject to compliance with applicable federal safety and hazardous materials transportation statutes and regulations, CSXT may continue to route cars to which the DC Ordinance applies via its lines through, and in the vicinity of, the District of Columbia." Petition of CSX Transportation, Inc. for Declaratory Order, STB Finance Docket No. 34662 (Feb. 7, 2005) (Exhibit 14 hereto)

at 1. Acknowledging the urgency of the matter, the Board ordered comments to be filed by February 16, 2005. The STB has no authority to enjoin the enforcement of the District Act, but can enter the relief sought by CSXT.

Twenty-six parties filed comments supporting CSXT's Petition, including the United States DOT, nineteen shipper parties (eleven individual companies and eight trade associations), and six railroad parties (including individual railroads, the Association of American Railroads, and an association of railway suppliers). *See* Docket, CSX Transportation, Inc. Petition for Declaratory Order, STB Finance Docket No. 34662 (Feb. 18, 2005) (Exhibit 13 hereto). Only the District of Columbia and the Sierra Club filed comments opposing CSXT's Petition.

The United States DOT, through its General Counsel, stated:

> [The DOT] urges the Board to grant the CSX petition. The D.C. ordinance is preempted under safety statutory provisions administered by the Department. We believe that there is also a sound basis for preemption under the ICCTA preemption provision administered by the Board. If the D.C. ordinance is allowed to stand other local governments may be encouraged to enact similar restrictions on hazardous materials transportation, potentially blocking the safe and efficient movement of this cargo throughout the United States.

DOT Comments (Ex 2) at 1-2. The DOT explained that rail safety and security has been comprehensively regulated under three federal statutes—the FRSA, HMTA, and ICCTA:

> Maintaining national rail uniformity has thus been committed to the regulatory oversight of three agencies—the Department of Transportation, the Department of Homeland Security, and the Surface Transportation Board. Working individually within their respective jurisdictions each has the complete authority to preempt non-Federal laws that undermine national rail uniformity.

DOT Comments at 5. The DOT then explained that the District Act was preempted under the express preemption provisions of those three statutes. DOT Comments (Ex. 2) at 5-13. According to the DOT, local bans are inimical to national transportation policy:

> The safe transportation of hazardous materials is addressed by the comprehensive regulatory approach embraced in RSPA and FRA regulations. Under that approach, the risk to the nation of transporting hazardous materials is minimized by permitting railroads to carry such cargo on routes where time in transit will be minimized. As a general matter, that is accomplished by using the shortest route having the best quality track (higher classes of track permit higher speeds). A local government that tries to lower the risk of releases of hazardous materials within its jurisdiction by barring the transportation of those materials through it, thereby shifting the risk to others, contravenes the national policy in the same manner: it raises everyone's risk and clogs the transportation system.

Id. at 8.

The shipper parties also expressed the view that uniform federal regulation of rail transportation is essential. In addition to the eleven individual companies that filed comments, the trade associations that filed comments spoke for many additional companies, including chemical manufacturers, electric companies, fertilizer manufacturers, mining companies, radiopharmaceutical manufacturers, and sulfur product manufacturers. The National Industrial Transportation League spoke for its approximately 600 company members from many different sectors of the economy, all engaged in the transportation of goods. All the shippers expressed their concern that the District Act, and other similar local legislation, would make the transportation of hazardous materials less safe and secure. For example, the American Chemistry Council (the "ACC"), the trade association for chemical manufacturers, explained the importance of chemicals in the nation's economy, which amount to about 3,700 shipments of

chemicals classified as hazardous materials per day by rail. Comments of the American Chemistry Council, STB Finance Docket No. 34662 (Feb. 16, 2005) (Exhibit 16 hereto) at 1-2. The ACC cautioned (at 4):

> ACC understands that the residents and government of the District of Columbia are concerned about hazmat shipments. But the business of chemistry also understands that people throughout the country depend on the safe delivery of these products for a wide array of critical uses every day. Properly seen from a national perspective, to allow local governments to prohibit or interfere with hazmat transportation would not improve overall safety and security.

The comments of the railroad parties included the views of all the major rail carriers (through the comments of the Association of American Railroads and Norfolk Southern individually) as well as dozens of smaller railroads. All agreed that the District Act and similar routing restrictions that would undoubtedly be enacted if the District Act were not invalidated would cripple interstate commerce in the Banned Materials and the industries that rely on that rail service. No commercial interest or federal regulatory authority commented in favor of the District Act.

IV. THE EFFECT OF THE DISTRICT ACT

The District Act seriously impairs, if not completely prevents, CSXT's use of its I-95 Line and its B&O Line for transportation of both loaded and unloaded cars of the Banned Materials. With respect to north-south movements via the I-95 Line, the closest alternative route available to CSXT is its line running west of the Appalachian Mountains through Tennessee, Kentucky and Ohio. Gibson Aff. (Ex. 1) ¶ 33. The closest alternative east-west route to the north runs from Albany to Buffalo, and thence along Lake Erie through Cleveland, Ohio. The closest alternative east-west route to the south is

CSXT's line from Richmond to Charleston, W. Va. and points west. *Id*. ¶¶ 35-38. Diversion of hazardous commodities to these alternative lines would severely impair the efficiency of CSXT's rail service for these shipments. *Id*. ¶ 39.

The reroutes made necessary by the District Act would add hundreds of miles of circuity and days of transit time. Much of the traffic would be forced to move over the CSXT rail line through Cleveland – Buffalo – Rochester – Syracuse – Albany – northern New Jersey/New York City metropolitan area – and Philadelphia. *See* Gibson Aff. (Ex. 1) ¶¶ 34-38 (giving specific examples of inefficient moves forced by District Act).

Nor could the Banned Materials be routed over the lines of the other major rail carrier east of the Mississippi, Norfolk Southern. Norfolk Southern has advised the STB that it will not accept these shipments from CSXT. *See* Comments of Norfolk Southern Railway Co., STB Finance Docket No. 34662 (Feb. 16, 2005) (Exhibit 15 hereto) at 3. *See also* Gibson Aff. (Ex. 1) ¶ 40.

Approximately 11,400 loaded and empty cars would be affected each year. Diversion of these shipments to markedly inefficient routings, solely to avoid the District of Columbia, would generate an additional 2,000,000 car miles and an additional 7,400 car handlings every year. This translates to 12,500-14,300 additional "car days" per year above those required by CSXT's current operating plan.[8] Gibson Aff. (Ex. 1) ¶ 30. The District Act would thus have a seriously detrimental impact on the entire CSXT network. The transition to a new operating plan would require a substantial investment in planning

[8] Like all Class I rail carriers, CSXT operates its rail network pursuant to a comprehensive operating plan designed to meet customer requirements in an efficient and safe manner.

and computer programming. Even after the reroutes were phased in, the Act would significantly decrease the capacity and flexibility of the CSXT rail network. *Id*. ¶ 44.

The resulting increase in car cycle time would impose substantial additional costs on shippers and users of the Banned Materials. Gibson Aff. (Ex. 1) ¶¶ 50-54.

Shifting cars to alternative routes would necessarily increase hazardous materials traffic in other communities. Gibson Aff. (Ex. 1) ¶ 55. Moreover, it is unlikely that detouring hazardous shipments around the District would produce any system-wide improvement in safety or security. To the contrary, longer transit times and distances, increased car handlings, and longer yard dwell times tend to *increase* the inherent risk of transporting hazardous materials. *Id*. ¶ 48; DOT Comments (Ex. 2) at 7-8.

The effect of copycat ordinances would be devastating. It would not take very many local bans like the District Act to eliminate completely all possible routings for the Banned Materials. Gibson Aff. (Ex. 1) ¶ 57. If that were to happen, the chlorine needed for water treatment systems and industrial processes, the propane needed for home heating, and many other critical materials would be stranded at the point of production. Producers of these commodities have invested in rail car fleets, not tank trucks, and there is simply insufficient tanker truck capacity suitable for these materials at present to move them by truck. *Id*. ¶¶ 10-11, 53-54.

STANDARD FOR INJUNCTIVE RELIEF

In considering whether to grant an application for emergency injunctive relief, a court must consider four factors:

> (1) whether there is a substantial likelihood that plaintiffs will succeed on the merits of their claims, (2) whether plaintiffs will suffer irreparable injury absent an injunction, (3) the harm to

> defendants or other interested parties (the balance of harms), and (4) whether an injunction would be in the public interest or at least not be adverse to the public interest.

Bradshaw v. Veneman, 338 F. Supp. 2d 139, 141 (D.D.C. 2004) (citing, *inter alia*, *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998)).

A party seeking injunctive relief does not have to prevail on each of the factors to be awarded such relief. Rather, "the factors must be viewed as a continuum, with more of one factor compensating for less of another." *Bradshaw*, 338 F. Supp. 2d at 141. Injunctive relief may be granted "'with either a high probability of success and some injury, or vice versa.'" *Id.* (quoting *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985)); *see also CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) ("If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak."). Injunctive relief may thus be justified "where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." *Id.* at 747.

In this case, each of the four factors weighs heavily in favor of granting CSXT preliminary injunctive relief.

ARGUMENT

I. CSXT HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIM.

CSXT submits that the District Act is invalid on five independent grounds. First, the District Act violates the Commerce Clause of the United States Constitution as consistently interpreted by the United States Supreme Court. Second, third and fourth, the District Act is preempted by the express preemption provisions of each of three

federal laws—FRSA, HMTA, and ICCTA. Fifth, the D.C. Council exceeded its legislative power under Congress's limited delegation set forth in the Home Rule Act, rendering the District Act void. Each of the five arguments is strong enough on its own to demonstrate a substantial likelihood of success on the merits. Taken together, Plaintiff's likelihood of success is compelling.

A. The District Act Violates the Commerce Clause of the United States Constitution.

The Commerce Clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Recognizing the need for free flow of goods and materials throughout the nation, the framers of the Constitution based the Commerce Clause "upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). The Supreme Court has explained that "[al]though phrased as a grant of regulatory power to Congress, the [Commerce] Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality*, 511 U.S. 93, 98 (1994). The District Act violates this so-called "dormant" aspect of the Commerce Clause by erecting a protectionist wall around the District of Columbia.

1. As Protectionist Legislation, the District Act Is *Per Se* Invalid.

Protectionist legislation is *per se* invalid, whatever the reason for the protectionism. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Kassel v.*

Consolidated Freightways Corp., 450 U.S. 662 (1981). In *City of Philadelphia v. New Jersey*, Philadelphia successfully challenged a New Jersey statute prohibiting the disposal of out-of-state waste in New Jersey. 437 U.S. at 618-19. In striking down the law, the Supreme Court reviewed its earlier cases striking down state laws designed to protect local economic interests:

> The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders.

Id. at 623-24 (citations omitted). The Supreme Court rejected New Jersey's effort to defend the statute on the ground that its interest in enacting the ban on out-of-state waste was not economic but environmental, concluding that the nature of the legislative purpose did not matter. *Id*. at 626-27. Protectionism is protectionism. Although the goal of legislation may be legitimate, that goal cannot be achieved by "isolating the State from the national economy." *Id.* at 627. The Supreme Court noted with foresight that the "Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all." *Id.* at 629.

The purpose and effect of the District Act, like the New Jersey statute, is overtly to block the flow of interstate commerce at the District's borders.[9] The District Act would shift traffic originating or terminating in the Mid-Atlantic region—traffic that would have passed through the District—to CSXT lines along Lake Erie to Buffalo and Albany, to northern New Jersey/New York City, and then through New Jersey to Philadelphia. Gibson Aff. (Ex. 1) ¶ 33. As the Supreme Court foresaw, the Commerce Clause protects New Jersey and other affected states from the District's effort to isolate itself from the problem of security in hazardous materials transportation, "a problem shared by all." *City of Philadelphia v. New Jersey*, 437 U.S. at 629.

The Supreme Court returned to the problem of protectionist legislation three years later when it struck down an Iowa law that prohibited trucks with double trailers from using Iowa's interstate highways. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981). Although different Justices took somewhat different paths to reach the judgment that the statute violated the Commerce Clause, the majority agreed that "a State cannot constitutionally promote its own parochial interests by requiring safe vehicles to detour around it." *Id.* at 678. Justice Brennan readily rejected the Iowa statute as protectionist legislation invalid on its face:

> [T]he decision of Iowa's lawmakers to promote *Iowa*'s safety and other interests at the direct expense of the safety and other interests of neighboring States merits no . . . deference. No special judicial

[9] The delineation of the "Capitol Exclusion Zone" within the District is an artifice that cannot save the legislation from the *per se* rule of invalidity. Whether the prohibition extends to the borders of the District, the Capitol Exclusion Zone, or a foot-wide transection of the CSXT rail lines, the effect is the same: the District Act erects a protectionist wall to the lawful interstate transportation of these materials.

> acuity is demanded to perceive that this sort of parochial legislation violates the Commerce Clause.

Id. at 687 (concurring opinion). The District's effort to eliminate its risk at the expense of its neighbors must similarly be rejected.

2. The District Act Is Also Invalid Because It Imposes an Unreasonable Burden on Interstate Commerce.

Nor can the District Act be upheld under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). If a local law "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. But the Act's effects on interstate commerce are not merely incidental; they are direct, immediate, and intended.[10] In addition, the District Act places a burden on interstate commerce that is not justified by legitimate, countervailing local interests. It therefore violates the Commerce Clause.

From a purely local perspective, the District can attempt to argue that the balance of the local benefit (complete elimination of the risk of one type of terrorist attack) and the local burden (none, since there is no local commerce in the Banned Materials) justifies the District Act. But that is always the case with protectionist legislation, which, by definition, ignores extraterritorial effect. The D.C. Council did not undertake any balancing of benefits and burdens from the perspective of all the affected parties: CSXT, producers and users of the Banned Materials, and the residents of other jurisdictions that

[10] Indeed, the effect is *entirely* borne by interstate commerce, as no rail shipments originate or terminate in the District. Gibson Aff. (Ex. 1) ¶ 7. The District is thus in a position to ban transport of these critical materials without adverse local effect because there is no local commerce in these materials in the quantities specified in the Act.

would experience increased traffic in the Banned Materials. The increased burden on residents of many other jurisdictions (including residents of the New York City metropolitan area who also sustained a terrorist attack) completely offsets the benefit to District residents. The additional burden on producers and users of critical raw materials, without any benefit to them from eliminating the high capacity rail routes through the District, also warrants striking down the Act. One need not even consider the burden on the common carrier—CSXT—to conclude that the Act fails the *Pike* balancing test.

Precedents demonstrate that the District of Columbia lacks a persuasive local interest under the *Pike* analysis. Although public safety, as a general matter, is "primarily, and historically, a matter of local concern," *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985), the functioning of interstate railroads is primarily, and historically, a matter of *national* concern. That national concern overrides local interests. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 783-84 (1945). In *Southern Pacific*, the Supreme Court struck down an Arizona statute limiting train lengths, stating that "if the length of trains is to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable to the operation of an efficient and economical national railway system." *Id.* at 771. In assessing one state's regulation, the Court explained, one must consider the practical effect if others followed suit: "If one state may regulate train lengths, so may all the others . . . ." *Id.* at 775. Indeed, it was "apparent" that regulations that affect train operations beyond the boundaries of a state "must be prescribed by a single body having a nation-wide authority." *Id.* A state cannot avoid the Commerce Clause by "simply invoking the convenient apologetics of the police power." *Id.* at 780 (quotation omitted).

As the Supreme Court explained, the impermissible burden on interstate commerce is seen most clearly when one considers the potential impact of other areas enacting similar legislation. *Id.* at 775. It would not take many local jurisdictions enacting legislation like the District Act to block all possible routes for shipment of hazardous materials, bringing interstate commerce in these essential materials to a halt. Gibson Aff. ¶ 57.

Thus, there is a substantial likelihood that the Court will rule in favor of Plaintiff and find that the District Act violates the Commerce Clause.

B. The District Act Is Expressly Preempted by the Federal Railroad Safety Act.

The District Act is preempted under the express preemption provision of the Federal Railroad Safety Act of 1970, as amended, 49 U.S.C. § 20106, and the Supremacy Clause of the United States Constitution, U.S. Const., art. VI, ¶ 2.

FRSA's stated purpose is "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress concluded that rail safety could best be effectuated by providing for nationally uniform railroad safety standards, not subjecting railroads "to a variety of enforcement in 50 different judicial and administrative systems." Federal Railroad Safety and Hazardous Materials Transportation Control Act of 1970, H. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109. To this end, Congress provided a broad express preemption provision. *See* Statutory Addendum (49 U.S.C. § 20106). Congress

amended that preemption provision in 2002 to make it clear that FRSA's preemptive scope covers rail security as an integral aspect of rail safety.[11]

1. FRSA Completely Preempts All Municipal Ordinances Related to Rail Safety and Security, Without Exception.

Unlike states, municipal corporations such as the District of Columbia, *see* D.C. Code § 1-102, are completely preempted by FRSA from regulating any subject matter "related to railroad safety or security." The plain language of Section 20106 refers only to "states," and FRSA does not include the District of Columbia in its definition of "state" as some federal statutes do. *Cf.* HMTA, 49 U.S.C. § 5102(11). *See* DOT Comments (Ex. 2) at 9 n.2.

Courts have so interpreted FRSA. In *CSX Transportation, Inc. v. City of Plymouth, Michigan*, 86 F.3d 626 (6th Cir. 1996), the court, citing a long line of cases, held that Plymouth's crossing blocking ordinance did not qualify for the preemption exceptions in 49 U.S.C. § 20106 because Plymouth was not a state:

> Congress expressly intended that the FRSA preempt all railroad safety legislation except *state law* governing an area in which the Secretary of Transportation has not issued a regulation or order and *state law* more strict than federal regulations when necessary to address local problems.

Id. at 628. *See also Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112-13 (5th Cir. 1973) (holding that parish officials had no authority to require railroad to meet any safety standard beyond those in FRSA). In holding that a municipal train speed ordinance was preempted, the court in *Consolidated Rail Corp. v. Smith*, 664 F. Supp.

[11] Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 1701(c), 1711(a), 116 Stat. 2135, 2319-2320.

1228 (N.D. Ind. 1987), explained that any municipal regulation was incompatible with the national uniformity Congress directed in § 20106:

> [T]he municipalities' suggested construction of [§ 20106] utterly would defeat Congress' purpose in enacting the FRSA—enhancement of railroad safety by making railroad regulation uniform. Congress was concerned that the existence of fifty separate regulatory systems in the fifty states would undermine safety. If so, separate regulation by every city, village, township, or hamlet along the mainline would undermine safety infinitely more. *Separate municipal regulation of speed is so greatly at odds with the Congressional purpose of uniformity as to need no further argument.*

Id. at 1238 (emphasis added). This conclusion applies with even greater force to municipal *prohibitions* on the interstate transport of lawful freight.

The analysis under § 20106 ends here. The District Act is preempted by FRSA.

But even if the District of Columbia were considered a state under the FRSA, the District Act would still be preempted by the FRSA because its subject matter—the security of the transportation of hazardous materials by rail—has been covered by the Secretaries of Transportation and Homeland Security. And once a DOT or DHS regulation covers the subject matter, states are authorized to regulate only with respect to an "essentially local safety or security hazard" and only if the state law or regulation is not incompatible with federal law and does not unreasonably burden interstate commerce. The District Act cannot escape preemption under these limited exceptions.

2. The Secretaries of Transportation and Homeland Security Have Covered the Subject Matter of the Safe Transportation, Including Security, of Hazardous Materials by Rail.

The Secretary of Transportation, through the FRA, administers FRSA and other federal railroad safety laws, which encompass "every area of railroad safety." 49 U.S.C.

§ 20103(a). The Secretary has issued and enforces the federal railroad safety regulations, 49 C.F.R. §§ 200-268, which take up over 700 pages in the Code of Federal Regulations. Through the RSPA, the Secretary has also issued regulations "for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce," including by rail, pursuant to the Hazardous Materials Transportation Act. 49 U.S.C. § 5103(b). The HMTA regulations that apply to rail, 49 C.F.R. §§ 171-174, 178-180 (over 900 pages in the Code of Federal Regulations), are enforced by the FRA.

FRSA's preemptive umbrella covers any rail safety action taken by the Secretary of Transportation under any rail safety law and extends to the federal Hazardous Materials Regulations issued by the Secretary under HMTA. *See CSX Transportation, Inc. v. Public Utilities Comm'n of Ohio,* 901 F.2d 497, 501 (6th Cir. 1990).

The Secretary has regulated the specific subject matter of the security of the transportation of hazardous materials by rail. Immediately after September 11, 2001, the rail industry, working in cooperation with the Government, developed a plan to upgrade the security of the national rail network. Each Class I railroad (including CSXT) then developed its own specific security plan. RSPA published a final rule (HM-232) on March 25, 2003, requiring persons who offer for transportation or transport certain highly hazardous materials, including rail carriers, to develop and implement security plans and to train appropriate employees in security measures. Hazardous Materials: Security Requirements for Offerors and Transporters of Hazardous Materials, 68 Fed. Reg.

14,510, 14,521 (Mar. 25, 2003) (codified at 49 C.F.R. §§ 172.800-172.804).[12] *See* DOT Comments (Ex. 2) at 10-11.

Both the FRA and TSA have reviewed CSXT's security plan, including those aspects required by HM-232, and have concluded that it complies with this regulation.

The Secretary of Homeland Security, through TSA, has the authority to make determinations regarding the adequacy of security in all modes of transportation, including rail, and to set standards for additional rail security (after consultation with the Secretary of Transportation in accordance with 49 U.S.C. § 5103(b)(1)(C)). TSA evaluated DOT's rail safety and security regulations, including HM-232, and concluded that further security regulation is not presently required for the rail industry:

> TSA evaluated the measures currently required under DOT hazmat and rail regulations, the nature of rail operations, and the security enhancements completed by railroads, and has determined that, for the present, they adequately address the security concerns of which it is aware.

Notice, Hazardous Materials: Transportation of Explosives by Rail, 68 Fed. Reg. 34,470, 34,474 (June 9, 2003).[13]

[12] Councilmember Patterson referenced this Federal Register notice for the proposition that "security concerns raised by possible terror attacks on hazardous rail shipments are not adequately addressed by rules pertaining to accidental releases" (Statement on Introduction (Ex. 11) at 3), but failed to note that the Secretary of Transportation announced here the issuance of new rules to address security concerns.

[13] DOT and TSA continue to evaluate the need for further federal regulation to enhance rail transportation security. They agree that any further regulation must be based on a "comprehensive, risk-based approach" that is "narrowly tailored to suit the industry and the threat." 68 Fed. Reg. at 34,474.

The Secretary of Transportation and the Secretary of Homeland Security have thus covered the subject matter of the security of the transportation of hazardous materials by rail.[14]

3. The United States Capitol Is Not an "Essentially Local Safety or Security Hazard."

The District Act is not "necessary to eliminate or reduce an essentially local safety or security hazard" within the meaning of 49 U.S.C. § 20106(1).[15] The stated focus on the Capitol building of the United States of America does not bring the District Act within this exception. It is true that there is only one Capitol building, and that this building is located in the District of Columbia, but it is impossible to imagine a more quintessentially ***federal*** concern than the security of the federal Capitol building. The Supreme Court explained in *Southern Pacific* that matters are considered "local" if "because of their number and diversity [they] may never be adequately dealt with by Congress." 325 U.S. at 767. The Court reiterated that local matters are of a nature that the "incentive to deal with them nationally is slight." *Id.* It cannot be seriously argued that Congress has no incentive to protect the security of its own members and the quintessential symbol of our government.[16]

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[14] Although HM-232 is sufficient to preempt the District Act, it should be noted that TSA has given specific attention to security in the District through the D.C. Rail Corridor Project, described above at 14.

[15] DOT did not address this exception to FRSA preemption in its Comments filed with the STB, no doubt because it has no conceivable application in the present situation.

[16] The existence of the federal Capitol Police is compelling evidence to the contrary. *See* 2 U.S.C. §§ 1901, 1961 (creating the Capitol Police and setting forth its role in protecting the Capitol building).

Even if the Capitol were considered an essentially local safety hazard, the District Act is still preempted because it is incompatible with a "law, regulation or order of the United States Government." *See* FRSA, § 20106(2). As common carriers, CSXT and other Class I railroads have a statutory duty under current law to transport lawful goods and materials upon reasonable request. *See* 49 U.S.C. § 11101. This restriction on use of two CSXT main lines to handle certain commodities is incompatible with CSXT's common carrier obligations. The Act flatly prohibits the transportation of hazardous materials authorized by federal law.

More specifically, RSPA considered requiring carriers to include provisions for alternative routes in their security plans, 67 Fed. Reg. 22,028, 22,035 (May 2, 2002), but ultimately decided not to include this requirement. *Cf.* 49 C.F.R. § 172.802. In its Comments filed with the STB (at 13), DOT explains that because "RSPA deliberately afforded CSX the flexibility to make . . . en route security choices in its security plan," the District Act is preempted. And as noted above (at 10-11), Mr. Lockwood of DHS informed D.C. Councilmembers that DHS has authority to order rerouting, but had chosen other approaches. *See, e.g., Norfolk & Western Railway Co. v. Public Utilities Comm'n of Ohio,* 926 F.2d 567, 571-72 (6th Cir. 1991) (state regulation preempted where FRA had explicitly refused to adopt such a regulation).

Finally, the "essentially local hazard" exception cannot be invoked when a law is invalid under the Commerce Clause, 49 U.S.C. § 20106(3), as the District Act does.

* * *

Thus, on each ground of the express preemptive previsions of the FRSA, there is a substantial likelihood that this Court will find the District Act preempted under FRSA.

Because preemption under FRSA is so clear and dispositive, we will address the other two preemption provisions in more abbreviated fashion.

C. The District Act Is Expressly Preempted by the Hazardous Materials Transportation Act.

Under the authority of the Hazardous Materials Transportation Act, the Secretary of Transportation, through RSPA, has issued regulations governing the safe and secure transportation of hazardous materials by all modes of transportation (truck, rail, air and water). HMTA preempts state or local requirements that are not substantively the same as federal requirements in specified areas, 49 U.S.C. § 5125(b), and otherwise preempts a state or local regulation if (1) it is not possible to comply both with that regulation and the federal regulation, or (2) the state or local regulation is an "obstacle to accomplishing and carrying out" HMTA or an implementing regulation, 49 U.S.C. § 5125(a). *See* Statutory Addendum.

State and local efforts to regulate rail transportation have fared no better under the HMTA than they have under FRSA.[17] In *Union Pacific R.R. Co. v. City of Las Vegas,* 747 F. Supp. 1402 (D. Nev. 1989), a municipality attempted to regulate rail transportation by requiring a permit before transporting hazardous materials through the city. That attempt was readily struck down. The court held the ordinance preempted by HMTA:

[17] HMTA expressly provides for state or local *highway* routing requirements, but only under very limited conditions and subject to approval by the Secretary. 49 U.S.C. §§ 5125(c) and 5112. Significantly, no provision of HMTA allows state or local *rail* routing restrictions. The DOT Federal Motor Carrier Safety Administration has issued regulations implementing the highway re-routing requirements. 49 C.F.R. §§ 397.61-397.225. Even if these regulations authorized rail rerouting, which they do not, passage of the District Act does not satisfy *any* of the numerous requirements.

> [B]ecause the effect of the ordinance is to impermissibly delay or virtually stop the transportation of hazardous materials into, through, within and out of Las Vegas, the Ordinance, on its face, is inconsistent with the HMTA . . . and is preempted . . . .

Id. at 1404. *See also Southern Pacific Transp. Co. v. Public Service Comm'n of Nevada*, 909 F.2d 352, 358-59 (9th Cir. 1990) (holding regulation requiring rail carriers to obtain permit for hazardous material handling and storage preempted by HMTA); *Missouri Pacific Railroad Co. v. Railroad Comm'n*, 671 F. Supp. 466, 481-82 (W.D. Tex. 1987) (holding Texas regulation requiring cabooses preempted by HMTA and FRSA), *aff'd*, 850 F.2d 264 (5th Cir. 1988) (affirming FRSA preemption and not reaching HMTA preemption).

The District Act is preempted under § 5125(b)(1) of HMTA because the D.C. ban on certain shipments is not substantively the same as federal law, which authorizes those shipments if the specified requirements are met. In addition, because the requirement to obtain a permit is a requirement to obtain a "shipping document" that is not required by federal law, the District Act is preempted under § 5125(b)(1)(C).

The District Act is also preempted under Section 5125(a) because it is impossible for CSXT both to comply with that Act and to exercise the routing flexibility RSPA deliberately afforded CSXT. *See* DOT Comments (Ex. 2) at 12-13.

Moreover, the District Act presents a considerable obstacle to CSXT's obligation to expedite shipments of hazardous materials, as required by 49 C.F.R. § 174.14. *See, e.g.*, State of Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas Intended to Be Used by a Public Utility, 44 Fed.Reg. 75,566, 75,571 (Dec. 20, 1979) (Inconsistency Ruling IR-2) ("Delay in [the transportation of hazardous materials] is incongruous with safe transportation.

Given that the materials are hazardous and that their transport is not risk-free, it is an important safety aspect of the transportation that the time between loading and unloading be minimized."), *upheld in National Tank Truck Carriers, Inc. v. Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd*, 698 F.2d 559 (1st Cir. 1983).

In supporting the District Act, proponents have pointed to a handful of cases in which state or local regulations of *trucks* were held not preempted by HMTA, particularly *National Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270 (2d Cir. 1982), *aff'g City of New York v. Ritter Transportation, Inc.*, 515 F. Supp. 663 (S.D.N.Y. 1981). However, in none of these cases was the transport of hazardous materials by *rail* at issue. In light of the fundamental differences in law and facts between railroads and trucks, trucking restriction cases provide no support for the District Act.

After *National Tank Truck Carriers*, RSPA rejected a further effort by New York City to regulate truck transportation of hazardous materials through truck design specifications. *See* City of New York Regulations Governing Transportation of Hazardous Materials, 52 Fed. Reg. 46,574 (Dec. 8, 1987) (Inconsistency Ruling IR-22). Notably, RSPA rejected the City's argument that its permit requirements were permissible because it promoted safety in a "uniquely dense urban environment," *id*. at 46,579:

> First, virtually every urban and suburban jurisdiction in the United States has a population density which is a matter of concern in planning for, and regulating, hazardous materials transportation. … Second,…delays and diversions of such transportation are of great safety concern. Third, and most significantly, this response is irrelevant. To the extent that the City believes the [federal Hazardous Materials Regulations] are inadequate, the City may file a petition for rulemaking with [the Office of Hazardous Materials Transportation] …or otherwise participate in OHMT rulemakings…

Id. at 46,583. The District's claim of uniqueness is appropriately met by this direction to petition the Federal Government, which has exclusive authority in this matter. Rather than follow that process, the District chose to ignore federal jurisdiction and act on its own in contravention of well-established judicial and administrative holdings.

D. The District Act Is Expressly Preempted by the Interstate Commerce Commission Termination Act.

Congress established a federal policy to promote a sound national rail transportation system "to meet the needs of the public and the national defense." 49 U.S.C. § 10101(4). Congress has entrusted the Surface Transportation Board with the responsibility and authority for ensuring that the national rail transportation system is sound. 49 U.S.C. § 10501.

As explained above, the question whether the District Act is preempted by the ICCTA's express preemption provision, 49 U.S.C. § 10501(b) (*see* Statutory Addendum), has been presented to the STB, which has jurisdiction to interpret the preemptive effect of its governing statute. Section 10501(b) provides that the jurisdiction of the Board over "transportation by rail carriers, and the remedies provided in this part with respect to . . . routes . . . is exclusive," and further provides that "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." This preemption provision is "clear and broad," and precludes "all state efforts to regulate rail transportation." *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); *see also CSX Transportation, Inc. v. Georgia Pub. Services Comm'n*, 944 F. Supp. 1573, 1581 (N.D.

Ga. 1996) ("It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.").

ICCTA preemption has been found even where the statute in question could be characterized as an exercise of state and local police powers to protect health, safety and the environment. In *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), for example, the Ninth Circuit held that the ICCTA preempted state and local environmental permit laws with respect to construction of a main line. *Id.* at 1029-31. The court rejected the city's argument that Congress intended only to preempt state "economic" regulation of railroads, not "traditional state police power," explaining that there is no clear line between "economic" regulation and "environmental" regulation: "For if local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *Id.* at 1031. Here, of course, the express purpose of the District Act is to prevent CSXT from operating over its main lines through the District. *See also Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001) (finding Texas anti-blocking statute that is in effect an economic regulation of railroads to be preempted).

CSXT has argued to the STB that the District Act constitutes an impermissible attempt to regulate "rail transportation," which includes routing.[18] The Act directly restricts CSXT's main line train operations, not only into and through the District itself,

[18] Whatever overlap there might be among the authority of the STB, FRA, RSPA and DHS/TSA with respect to routing of shipments of hazardous materials by rail, there is plainly no gap for state or local direction of rail routing.

but also into and through states throughout the CSXT rail network. Such an attempt to subject train movements to local regulation is clearly preempted by the ICCTA.

E. The District Act Was Not an Authorized Exercise of Legislative Power Under the Home Rule Act.

The District Act is also invalid because it was passed by the D.C. Council in violation of the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (as amended) ("Home Rule Act"). The Constitution empowers Congress "[t]o exercise exclusive Legislation in all Cases whatsoever, over . . . the Seat of the Government of the United States . . . ." U.S. Const., art. I, § 8, cl. 17. In the Home Rule Act, Congress delegated to the D.C. Council the power to "legislat[e] upon essentially local District matters," subject to "retention by Congress of the ultimate legislative authority" over the District of Columbia. Home Rule Act § 102 (D.C. Code § 1-201.02). In passing the District Act, the D.C. Council acted *ultra vires*, exceeding the limited legislative powers Congress granted to the Council.

Congress intended to relieve its burden of legislating about "essentially local" matters.[19] The Home Rule Act provides that "[t]he Council shall have no authority to . . . [e]nact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District." Home Rule Act § 602(a)(3) (D.C. Code § 1-206.02). Congress did not delegate to the D.C. Council the power to halt or impede the flow of

[19] *See* 119 Cong. Rec. 22,947 (1973) (Senator Eagleton stating, "I believe it is not in the interest of this body, nor is it in the interest of the citizens of the United States we are elected to represent . . . that the time of the U.S. Senate be spent preparing, holding hearings, considering and debating matters that are purely local in nature.").

interstate commerce; and the operation of the national rail network is not a "purely local" matter restricted to the District's boundaries. Accordingly, the D.C. Council had no authority to pass the Act. *See District of Columbia v. Greater Washington Central Labor Council, AFL-CIO,* 442 A.2d 110, 116 (D.C. 1982) (Congress sought to protect "the integrity of the federal domain as it relates to administration of federal legislation having national implications"); *Techworld Dev. Corp. v. D.C. Preservation League,* 648 F. Supp. 106, 115 (D.D.C. 1986) (holding that "the limitation of § 1-233 is included to ensure that the local government does not encroach on matters of national concern"); *McConnell v. United States,* 537 A.2d 211, 215 (D.C. 1988) (striking down District law that "work[ed] an effective repeal" of narcotic "legislation national in scope").

The District Act is also *ultra vires* because it was improperly passed as emergency legislation rather than permanent legislation. By proclaiming an "emergency" when manifestly none exists, the D.C. Council was able to avoid a second reading and review of its action by Congress, which must consider all but "emergency" legislation passed by the D.C. Council before such legislation can become effective. An emergency act may not be used when there is not really an emergency. *Atchison v. District of Columbia*, 585 A.2d 150, 156 (D.C. 1991). "[T]he test is whether the factual situation is such that there is actually a crisis or emergency which requires immediate or quick legislative action for the preservation of the public peace, property, health, safety or morals." *Id.* at 157 (quotation omitted). There is no emergency here. The comprehensive federal regulations described above are in place and TSA has given specific attention to the D.C. Rail Corridor. Indeed, when asked to provide an expedited

response to the STB proceeding, the District representatives repeatedly stated that there is "no imminent emergency."

Judicial review is needed of such non-emergencies "to safeguard Congress' reservation to itself 'of a substantial role in the legislative process through the "layover" provision permitting congressional [disapproval] or amendment of Council legislation.'" *Atchison*, 585 A.2d at 157 (alteration in original) (quoting *American Fed'n of Gov't Employees v. Barry*, 459 A.2d 1045, 1050 (D.C. 1983)). By falsely proclaiming an emergency, the D.C. Council seriously prejudiced CSXT and performed an end run around Congress. This Court should not countenance that maneuver.

For all of these reasons, the Court is likely to find that the District of Columbia government exceeded its authority under the Home Rule Act by enacting the ban on interstate shipment of hazardous materials.

II. CSXT, SHIPPERS AND THEIR CUSTOMERS WILL SUFFER IRREPARABLE HARM IF THE COURT DOES NOT GRANT INJUNCTIVE RELIEF.

For all the reasons set forth herein, CSXT will suffer irreparable harm if the Court does not issue a preliminary injunction. Because CSXT's claims are so strong on the merits, however, it need only show the possibility of "some injury": a preliminary injunction may be warranted "where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable harm." *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995). CSXT easily meets this standard.

As explained above, rerouting would impose serious operational burden, expense and risk on CSXT. The estimated 11,400 cars affected by the ban would have to be

rerouted over substantially longer routes (a total of about 2,000,000 additional miles) and subjected to an estimated 7,400 additional handlings, resulting in 12,500 to 14,300 additional car days per year above the efficient routing. The planning to identify the least disruptive alternative routes for these cars, and effecting the changes through instructions to the computer routing program, is in itself a difficult and burdensome undertaking. With a network already operating near or at capacity, routing these cars against the efficient flow would effectively reduce the capacity and flexibility of the CSXT network. *See generally* Gibson Aff. (Ex. 1) ¶¶ 30-32. The delays, disruptions, and managerial burdens imposed on CSXT by the District Act constitute irreparable harm. *See Long Island Ry. Co. v. Int'l Assoc. of Machinists*, 874 F.2d 901, 910-11 (2d Cir. 1989) (upholding preliminary injunction entered by District Court based on finding that railroad and the public would be irreparably harmed by disruptions of service caused by union's planned sympathy strike). Without a preliminary injunction, CSXT will be irreparably injured.

Shippers and their customers would also be irreparably injured by the District Act. Three members of the National Industrial Transportation League have executed affidavits that illustrate the injury shippers would face from District routing restrictions:

(1) Pioneer Companies, Inc. manufactures liquid chlorine and caustic soda in Québec and ships it via CSXT to a distributor in Florida. From there it is distributed for use by municipalities in water purification and by manufacturers of a host of products. *See* Affidavit of Michael Mazzarello (Feb. 10, 2005) (Exhibit 19 hereto) ¶¶ 3-4, 6. Mr. Mazzarello noted that chlorine is transported "almost exclusively in ninety-ton pressurized tank cars, since truck transportation would require many more shipments and

would be subject to far greater traffic hazards." *Id.* ¶ 7. He warned of the consequences of less efficient routing (¶ 8):

> Less direct routings would delay the delivery of essential water treatment products to water and wastewater treatment plants and endanger the health and safety of the general population. Efforts to overcome the effects of such delays in the longer term would involve an increase in shipments of hazardous materials, and the number of tank cars in transit at any given time and the number of miles traveled by each car would increase. While Pioneer has not experienced any incidents involving the transportation of hazardous materials over CSX's rail lines in over ten years, increases in shipments would increase the possibility of incidents in the future.

(2) Eka Chemicals Inc. manufactures sodium chlorate crystals in Québec and ships them on CSXT to pulp mills in Virginia, North Carolina and Georgia. Affidavit of Curt Warfel (Feb. 8, 2005) (Exhibit 18 hereto) ¶¶ 3 and 4. Mr. Warfel explained that pulp mills do not maintain large inventories of Eka's chemical products, so that timely delivery is very important to avoid a mill shutdown. He said that "[r]ail transport is the safest and only practical means for transporting the volume of product that we ship." *Id.* ¶ 7. Lengthening car cycle time would require Eka to lease more cars, "thus increasing the number of cars on the system and the opportunities for an accident." *Id.* ¶ 8.

(3) Solutia, Inc. manufactures a variety of hazardous materials in its Texas and Florida plants and ships them on CSXT to plants in Pennsylvania and Massachusetts for the manufacture of plastic laminates, water treating compounds and food additives. Affidavit of Harold W. Pyatt (Feb. 8, 2005) (Exhibit 17 hereto) ¶¶ 3, 6. Mr. Pyatt emphasized the importance of timely delivery of shipments: "On time service is very important in production scheduling and in determining the number of rail cars needed to meet transportation needs and it is critical to cost effective operations." *Id.* ¶ 7. He also

stated his concern that increasing the length of a route increases exposure to the possibility of an incident. *Id.* ¶ 7.

The large number of shippers who submitted comments to the STB, either individually or through their trade associations, is evidence in and of itself that the serious concerns of injury expressed by Messrs. Mazzarello, Warfel and Pyatt are generally shared by shippers.

III. THE BALANCE OF HARMS WEIGHS IN FAVOR OF THE INJUNCTIVE RELIEF CSXT SEEKS.

In considering a request for injunctive relief, a court must balance the harm that the plaintiff would suffer in the absence of an injunction against the harm that the defendant would suffer if the court grants the requested relief. *Bradshaw*, 338 F. Supp. 2d at 141. Here, in stark contrast to the irreparable harm that CSXT, shippers and their customers will suffer if the Court does not enjoin the District Act, the District of Columbia will suffer no harm if the legislation is enjoined pending the Court's review.

As explained above, no emergency prompted the enactment of the legislation. Comprehensive federal regulation and specific attention by federal agencies to the security of hazardous materials shipments within the District will continue while the Court considers the merits of CSXT's challenge. In addition, CSXT commenced in the Spring of 2004, after consultation with TSA and other federal agencies, voluntarily to reroute loaded cars of the Banned Materials from the north-south line that runs closest to the Capitol. CSXT will continue to consult with federal officials, and will be responsive to their directives, regarding the routing of those cars and other security matters.

IV. THE INJUNCTIVE RELIEF CSXT SEEKS IS IN THE PUBLIC INTEREST.

Granting the injunctive relief CSXT requests "would be in the public interest or at least not . . . adverse to the public interest." *See Bradshaw*, 338 F. Supp. 2d at 141.

First, the public interest "supports the granting of a preliminary injunction in order to protect the free flow of interstate commerce from unconstitutional interference." *See Waste Mgmt. Holdings, Inc. v. Gilmore*, 64 F. Supp. 2d 523, 536-37 (E.D. Va. 1999).

Second, an injunction would prevent shifting the risk inherent in moving these commodities from the District to other jurisdictions, including other densely populated areas. An injunction would also prevent the likely increase in aggregate risk caused by longer transit distances and times, and increased car handlings and dwell time.

Third, other jurisdictions will be cautioned against passing copycat legislation that could have disastrous consequences for our national transportation system and our national economy. Carriers such as CSXT would be forced to react to a maze of local legislation that would impede, if not block, the transportation of essential materials.

Fourth, with an injunction, all the relevant federal agencies will have an opportunity to react and set forth their views on the legitimacy of the District Act, which will benefit the courts, other federal regulatory agencies, and local legislatures.

Finally, enjoining the District Act will preserve Congress's right to review District legislation and disapprove it before legislation that exceeds the D.C. Council's authority (or is otherwise objectionable) is enforced.

V. SECURITY.

Plaintiff submits that the security required pursuant to Federal Rule of Civil Procedure 65(c) and Local Civil Rule 65.1.1 need not be substantial. The purpose of

such security is to pay "such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). As discussed in Part III, *supra*, Defendants would suffer little, if any, injury from the issuance of emergency injunctive relief that is later overturned. Plaintiff therefore respectfully requests that the Court require only a modest security in this case.

CONCLUSION

For the foregoing reasons, Plaintiff CSXT respectfully requests that the Court grant Plaintiff's motion for a preliminary injunction, pending the Court's final review on the merits, enjoining the implementation and enforcement of the District Act or any variation of that Act that seeks to prohibit in the longer term the transportation within the District of Columbia of materials that may lawfully be transported in interstate commerce in accordance with federal regulations.

Respectfully submitted,

Dated: February 22, 2005 /s/ Mary Gabrielle Sprague

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